

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JAYLENE F. MILLNER,

Appellant.

No. 36842-1-II

UNPUBLISHED OPINION

Armstrong, J. — Jaylene F. Millner appeals her restitution order for \$8,787 arising out of a conviction for third degree theft. She argues that the trial court erred by basing the award on amounts that she confessed to stealing, rather than the amounts she was convicted of stealing. She also contends that the trial court erred in including investigative costs and compensation for time spent gathering evidence and coordinating with investigators because those costs were not necessarily caused by the specific thefts that were the basis of her conviction. Because the trial court did not make specific findings as to whether each item claimed in the restitution estimate was necessary and specifically caused by Millner’s crime, we vacate the award and remand to the trial court to do so.

FACTS

On separate occasions, Jaylene F. Millner substituted the price on a package of crab for the price of liver and reduced the price of two pepper bacon items belonging to Jack’s Country Store, her employer, without authorization. She then purchased the items for herself. The State charged her with one count of first degree theft. Following a bench trial, the court convicted Millner of the lesser offense of third degree theft because the State was unable to prove losses

above \$250. Although Millner confessed to stealing more than \$1,500 in an illegal price-changing scheme spanning several occasions, the court did not consider that evidence in its decision because the State did not corroborate it.

Jack's Country Store submitted an itemized restitution estimate and impact statement including external and internal costs totaling \$8,787. The internal costs consisted mostly of employee time for surveillance camera installation and video review, records investigation, time with investigators, time with insurance claims, and time in court. The trial court found that surveillance set-up and analysis, as well as the managerial costs directly related to Jack's Country Store's owner, Tom Downer, were reasonably related to Millner's actions and awarded \$8,787 in restitution. Millner now appeals.

ANALYSIS

Millner contends that the trial court erred by (1) basing \$6,200 of its restitution order on the amount she admitted stealing in a statement to the police rather than the amount she was convicted of stealing and (2) including broad investigation costs of Jack's Country Store in the restitution order. The record does not support Millner's claim that the court based its restitution order on the amount she admitted stealing. Rather, the restitution amount matches the estimate submitted by Jack's Country Store, which does not include the amount Millner admitted stealing. Thus, we consider only whether the trial court properly considered the costs submitted by Jack's Country Store in its restitution order.

The authority to impose restitution is statutory. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). We will not disturb a trial court's restitution order absent an abuse of

discretion. But an incorrect legal analysis or other legal error can constitute an abuse of discretion. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). Because the legislature intended “to grant broad powers of restitution” to the trial court, we do not engage in a technical analysis that would allow the defendant to escape just punishment. *Tobin*, 161 Wn.2d at 524 (quoting *State v. Davison*, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991)).

RCW 9.94A.753(3) provides in relevant part that “restitution . . . shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury.” This provision does not limit restitution to the amount proven as part of the underlying offense. *State v. Rogers*, 30 Wn. App. 653, 658, 638 P.2d 89 (1981). However, restitution is allowed only for losses that are “causally connected” to the crime; in other words, but for the crime, the victim would not have sustained the particular loss. *Tobin*, 161 Wn.2d at 524 (citing *State v. Kinneman*, 155 Wn.2d 272, 286-87, 119 P.3d 350 (2005)). Investigative costs may be a part of the “loss of property” on which restitution is based. *Tobin*, 161 Wn.2d at 525 (citing *Kinneman*, 155 Wn.2d at 287).

Millner argues that the record does not support the trial court’s conclusion that *all* the investigative costs presented by Jack’s Country Store for compensation were caused by the two specific thefts she was convicted of. Jack’s Country Store’s estimate did not denote the dates on which the costs were incurred, so it is impossible to know whether they arose before or after January 4 and March 10, 2007, the dates of her crimes. Indeed, the estimate introduces the account of Jack’s Country Store’s costs by saying that they “beg[an] when we first suspected Ms. Millner’s dishonesty.” Clerk’s Papers at 31. This statement strongly suggests that at least some

No. 36842-1-II

of the costs could not have been caused by the thefts underlying Millner's convictions because those thefts had not yet occurred. We therefore vacate the trial court's restitution award and remand to the court to make the specific findings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

I concur:

Penoyar, A.C.J.

Bridgewater, J. (concurring) — I agree with the majority that the trial court’s findings regarding Jack’s Country Store’s investigative costs were insufficient to support the \$8,787 restitution award. I write separately, however, to express my deeper concern regarding the amount of restitution in this case as compared to the amount of the underlying crime.

RCW 9.94A.753(3) provides:

[R]estitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. *The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime.*

(Emphasis added). Millner argued below that the final sentence of this provision limited her restitution liability to double the amount that she was convicted of stealing: \$55. She does not repeat this argument on appeal, but I believe that this court should exercise its discretion to consider it anyway.

This court reviews questions of statutory construction de novo. *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003). Our primary duty in interpreting any statute is to discern and implement the intent of the legislature. *Wentz*, 149 Wn.2d at 346. We begin with the statute’s plain language, which we interpret according to the ordinary meaning of the language at issue, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). When the statutory language admits only one meaning, we apply it without engaging in any other

construction. Only if the statutory language is susceptible to more than one reasonable interpretation will we resort to other indicators of legislative intent, including legislative history, to resolve the ambiguity. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005).

Applying these principles to the last sentence of RCW 9.94A.753(3), I believe that two things are plain. First, the sentence is intended to be a *limitation* on the “victim losses” that are awardable, not an authorization for doubling those losses. This is apparent from the structure and substance of the subsection as a whole; while the first two sentences define what types of costs *may* constitute restitution, the final sentence provides that the ultimate *award* “shall not exceed” an amount proportional to the crime. Second, the terms “victim’s loss from the commission of the crime” and “easily ascertainable damages” are not intended to be used interchangeably. It is a fundamental principle of statutory construction that when the legislature uses two different terms in the same statute, courts presume that it intended the terms to have different meanings. *Densley v. Dep’t of Retirement Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007). Under this reading of RCW 9.94A.753(3), the maximum restitution award in this case was \$110 because Millner was convicted of stealing only \$55.

The legislature’s decision to limit restitution in this way is rational and consistent with the goals of criminal sentencing. Restitution is not intended to replace a victim’s civil remedies. RCW 9.94A.753(9). Rather, it serves a primarily punitive function that must be, like any sentencing element, “proportionate to the seriousness of the offense.” RCW 9.94A.010(1); *State v. Ewing*, 102 Wn. App. 349, 352, 7 P.3d 835 (2000) (cited in *State v. Kinneman*, 155 Wn.2d

No. 36842-1-II

272, 119 P.3d 350 (2005)). For these reasons, I believe that the trial court erred in imposing

\$8,787 in restitution for a theft of \$55, and I would reverse.

Bridgewater, J.